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In the

Supreme Court of the United States

October Term, 1940.

No. 34.

L. Singer & Sons et al., *Petitioners*,

vs.

Union Pacific Railroad Company, *Respondent*.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

PETITIONERS' REPLY BRIEF.

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I.

STATEMENT.

Both petitioners and respondent have already filed their briefs in this case. The purpose of this brief is to reply to some of the more important arguments made by the respondent.

II.

Term "party in interest" is not confined to person having cause of action independent of statute.

One of the principal, if not the principal, arguments of respondent is that Congress, in providing in Section 1 (20) of the Interstate Commerce Act, 49 U. S. C. A. 1 (20), for a suit by "any party in interest" to enjoin illegal construction or operation, intended to describe only a person who has a cause of action under the general principles of the law as previously laid down by the courts independent of statute (Respondent's brief, pp. 10-21). So construed, the statute is merely declaratory of the law existing before it was passed, and would bring in no new group of persons entitled to enjoin wasteful and destructive competition.

The conclusive answer to this contention is found in respondent's own brief. "Prior to the enactment of the Transportation Act 1920, even a rail carrier could not complain of honest competition" (Respondent's brief, page 26). But since the passage of the statute a rail carrier may maintain an action because it has had "conferred upon it the right to be free from unauthorized competition" (*Id.*, pp. 38-39). So, also, of a company chartered to build a railroad (*Id.*, pp. 39-40) of a ferry company. (*Id.*, pp. 42-43), and of the owner of land sought to be condemned for the new line (*Id.*, p. 42).

Respondent does not seem to realize the implications of the admissions it has made in its own argument. If the provisions of Section 1 (20) serve to confer a right of action where previously there was none, then the term "party in interest" is not confined to the description of a party with a cause of action under general principles of law irrespective of statute, but has a broader scope.

It necessarily confers a right of action where none before existed.

The admissions in respondent's brief which inevitably led to this conclusion are not accidental or inadvertent. They are not made voluntarily by the respondents, but are compelled by decisions of this Court which it cannot ignore. This Court, as well as other federal courts, has declared that, in the absence of statutory permission, unauthorized competition may not be enjoined. *Tennessee Electric Power Co.* v. *Tennessee Valley Authority*, 306 U. S. 118; *Alabama Power Co.* v. *Ickes*, 302 U. S. 464; *Edward Hines, Trustees* v. *United States*, 263 U. S. 143; *West Tennessee Power & Light Co.* v. *City of Jackson*, 97 Fed. (2d) 979; *Carolina Power & Light Co.* v. *South Carolina Public Service Authority*, 94 Fed. (2d) 520; *Railroad* v. *Ellerman*, 105 U. S. 166. Similarly, it has decided, in cases which do not involve the slightest conflict, that, by virtue of the provisions of Section 1 (18-22) a suit to enjoin unauthorized competition in the railroad field may be maintained by a competing rail carrier, *Texas & Pacific Railway Co.* v. *Gulf, Colorado & Santa Fe Railway Co.*, 270 U. S. 266; *Western Pacific* v. *Southern Pacific Co.*, 284 U. S. 47, or by a competing ferry, *Claiborne-Annapolis Ferry Co.* v. *United States*, 285 U. S. 382, 391.

In deciding cases in the second group, this Court went to considerable pains to make it perfectly clear that the cause of action under Section 1 (20) is entirely statutory in origin. Thus, it said in *Western Pacific* v. *Southern Pacific*, 284 U. S. 47, 51-52:

> "Prior to the statute, it could not have maintained such a suit, since the competitor's proposed action did not threaten interference with any legal right. No carrier could then demand exemption from honest competition.

"If, as the court below seems to have assumed, a 'party in interest' must possess some clear legal right for which it might ask protection under the rules commonly accepted by courts of equity, the paragraphs under consideration would not materially aid the Congressional plan for promoting transportation. On the other hand, there was no purpose to permit any individual so inclined to institute such a proceeding. The complainant must possess something more than a common concern for obedience to law. See *Massachusetts* v. *Mellon*, 262 U. S. 447, 488. It will suffice, we think, if the bill discloses that some definite legal right possessed by complainant is seriously threatened or that the unauthorized and therefore unlawful action of the defendant carrier may directly and adversely affect the complainant's welfare by bringing about some material change in the transportation situation. Here, the petitioner was peculiarly concerned; its own welfare was seriously threatened. It alleged the beginning of an unlawful undertaking by a carrier which might prove deleterious to it as well as to the public interest in securing and maintaining proper railroad service without undue loss."

The court could not have been more specific than when it said in *Claiborne-Annapolis Ferry Co.* v. *United States*, 285 U. S. 382, 391:

"The right of appellant Ferry Company to institute and maintain this proceeding *rests wholly upon the permission granted by paragraph 20, §1.* 'Any party in interest' may institute a suit to enjoin proposed construction, operation, or abandonment of a carrier's line unless it has obtained a certificate of public convenience and necessity from the Interstate Commerce Commission." (Italics ours.)

The respondent's difficulty is attributable to its failure to distinguish the two groups of cases. It fails to recognize that the cases in the first group, which it erroneously regards as controlling in its favor, deal entirely with the application of the ordinary rule governing the right to sue, in the absence of statute, and cannot be controlling or persuasive or even in point, where, as here, the ordinary rule has been changed by statute.

The only case in the first group which arose under the Interstate Commerce Act is *Edward Hines, Trustees* v. *United States,* (1923) 263 U. S. 143. Concededly, it did not arise under Section 1 (20). It is cited by respondent as a judicial definition of the phrase "party in interest" and more specifically as holding that the term "any party or parties in interest to the proceedings before the Commission," employed in Section 45a, Title 28, U. S. C. A., does not include one whose competitive position has been injured but only one who has suffered legal injury under ordinary principles of law. Respondent is mistaken and the case does not so hold. The phrase "any party or parties in interest," etc., is not mentioned in the opinion and was not involved because, as the court said—contrary to the view entertained by the respondent —"the plaintiffs had not been parties to the proceedings before the Commission" (263 U. S. 144).

III.

Statutory right of action not limited to carriers but extends to all persons whose welfare is directly and adversely affected.

Respondent contends that since the only parties who have successfully maintained an action in the limited number of suits for injunction that have been brought under Section 1 (20) have been a rail carrier, a company

organized to operate as a rail carrier, a carrier by ferry, and a person whose land is sought to be condemned, they are the only persons embraced within the scope of the phrase "party in interest" appearing in the statute (Respondent's brief, p. 28). This is a plain *non sequitur*. It ignores the generality of the phrase "any party in interest." This language is not restricted to persons engaged in any particular occupation, such as the operation of a railroad or a ferry, but extends to any person no matter what his occupation whose welfare may be directly and adversely affected by the unlawful construction or operation prohibited by the statute. "It will suffice, we think," this Court said in *Western Pacific* v. *Southern Pacific Co.*, 284 U. S. 47, 51, "if the unauthorized and therefore unlawful action of the defendant carrier *may directly and adversely affect the complainant's welfare by bringing about some material change in the transportation situation.*" (Italics ours.)

The Circuit Court of Appeals expressly held in the case at bar (R. 38) that complainants' welfare would be adversely affected, and it cannot be denied that the construction of the new produce terminal will, under the allegations of the complaint, bring about some material change in the transportation situation. The only remaining question, therefore, is whether the unlawful action may directly affect the petitioners' welfare.

IV.

Petitioners' welfare will be directly affected.

Respondent contends that the injury to the petitioning produce dealers under the allegations of the complaint is indirect rather than direct and the remote rather than the proximate result of the respondent's unlawful action

(Respondent's brief, page 40); and that petitioners complain not of any injury to themselves, but on account of injury to railroads in competition with the respondent (*Id.*, pp. 19-21). But these contentions not only reflect a misapprehension of the allegations respecting the effect of the unauthorized construction on competing railroads, but more importantly they also entirely ignore other allegations respecting other forms of injury which will be visited solely on the petitioners.

First. The complaint sets forth in detail how the unauthorized extension would result in needless and wasteful expenditures by the respondent and would cause destructive competition between the respondent and other railroad companies (R. 3, 4). The injury resulting from such wasteful and uneconomical practices is visited not alone upon the railroads, but also upon the shippers who are dependent upon them for service, since such practices inevitably result in higher rates or poorer service, or both, and shippers such as the petitioners bear the burden. The objective of the statute is to put an end to these practices, and one of the methods contemplated by the statute for securing this objective is an injunction suit by any party in interest—by any one with a real interest in fact in the transportation situation threatened with an unauthorized and illegal disturbance.

Second. An analysis of the complaint will show that it contains allegations of specific injury to petitioners alone. Petitioners are engaged in buying and selling produce at the terminal market in Kansas City, Missouri (R. 1). It is alleged that the respondent Union Pacific and the City of Kansas City, Kansas, are together "now engaged in building a so-called 'food terminal' or produce market" (R. 2). This unnecessary and wasteful duplication of existing facilities will destroy or seriously

and adversely affect the property, businesses, and investments of the petitioners in the Missouri terminal (R. 3). It "will directly and adversely affect the property interests of the plaintiffs and the public generally by bringing about a material change in the transportation situation, and will constitute an unnecessary burden upon interstate commerce directly and adversely affecting the welfare of plaintiffs and the public interest" (R. 4).

Coupled with the other averments, these allegations are sufficient under Rule 8 of the new Federal Rules of Civil Procedure to meet the requirements of "a short and plain statement of the claim showing that the pleader is entitled to relief." Under them petitioners will be able to offer proof of the facts in support of the allegations of direct injury flowing from the acts of the respondent. They will be able to prove that the respondent Union Pacific itself deliberately set out to destroy the market in which they are financially interested. The District Court, in another case arising out of the respondent's activities in the construction and operation of the new Kansas City Food Terminal, *United States* v. *Union Pacific R. Co.*, 32 F. Supp. 915, 921, summed the facts up as follows:

> "The Union Pacific, DeOreo and Fean, and the City all realized early that a division of the wholesale business between the existing market and the one proposed would be fatal to the success of both. It was therefore planned by the Union Pacific and other interested parties that the produce dealers located at the Missouri market would be induced to move to the new market. * * * The efforts of the representatives of the Union Pacific and the City to meet and counteract the opposition to the plan to move the Missouri dealers to the new market were directed by the Union Pacific."

The theory advanced by the respondent to the effect that the injury to petitioners is caused by competition from other produce dealers is a defensive fiction. The allegations of the complaint are that the injury will be caused by the acts of the respondent, and it would be inadmissible to assume that these allegations are idle or incapable of proof. They must be taken as admitted in considering the defenses advanced by the respondent which are the equivalent of a motion to dismiss.

While the Kansas City Food Terminal of respondent consists of two integral parts: (1) railroad facilities and (2) market facilities (R. 2, 3), it constitutes an inseparable whole. The two parts combine to make the terminal, and the presence of both is essential to the existence of the terminal. There would be no market facilities in the absence of railroad trackage and no railroad trackage in the absence of the market facilities. The market facilities jointly constructed by the respondent and the City and forming an inseparable part of the terminal are in direct competition with the market facilities owned by the petitioners at the Missouri terminal. But for the construction and operation of the Kansas terminal as a whole by the respondent, this injury to the business, property and investment of the petitioners would not occur, and there is no intervening, independent agency to break the chain of causation or to render the acts of the respondent indirect or remote in a legal sense.

It will not do to say that the damage to petitioners arises from the competition they suffer from produce dealers located at the new food terminal. Some of the damage arises from another cause: the duplication of the facilities owned by the petitioners at the Missouri market. Another part of the damage is, in a certain sense, caused by competition from the dealers at the new terminal, but

the intervention of their competition is not an independent, intervening cause but one set in motion by the original wrongful act of the respondent in constructing and operating the unauthorized extension of its line. 22 R. C. L. 134.

The test to be applied in determining what is a direct cause of injury in a case of this kind should be no stricter than in determining what is the proximate cause in a case of negligence. The acts of the respondent are the natural and probable cause of the injury which the petitioners have suffered. 22 R. C. L. 113, 118-128.

Where a territory is adequately served by existing railroads, the effect of the construction of an additional line is not to increase production or consumption, but to divide the already existing business. The company promoting the new line, in order to build up traffic for its profitable operation, is inevitably led into a campaign to induce all or a part of the dealers in the goods produced or consumed to locate their plants or warehouses on the new line. Some may be men previously in business along the lines of existing railroads, while others may be persons engaging in the business for the first time. The wasteful and destructive competition extends to the dealers. Plants and warehouses are duplicated and the field becomes overcrowded. In this way the natural and probable consequence of the construction of an unneeded new line is to injure the business and the property of those in business along the already existing railroad.

Petitioners do not contend that any one and every one may bring suit under Section 1 (20). They do believe, however, that any one who is directly interested in the specific transportation situation and who suffers definitely ascertainable pecuniary injury by an unauthorized exten-

sion of line which brings about a change in the situation, is entitled to maintain such an action.

In *Western Pacific* v. *Southern Pacific Co.*, 284 U. S. 47, this Court held that a company organized to operate as a rail carrier in a particular territory could maintain an action to prevent another railroad from making an unauthorized extension into such territory, because "the petitioner was peculiarly concerned. Its own welfare was seriously threatened." By saying that the petitioner's welfare was seriously threatened, the Court obviously referred, not as respondent suggests, to a threat to its legal rights, but to a threat to its financial interests which form the basis of the injury giving rise to the legal rights.

Petitioners here are in a strictly analogous situation. They are peculiarly concerned. Their own welfare is seriously threatened by the illegal acts of the respondents. This is as undoubtedly true as a matter of substance in the one case as in the other. The petitioners are parties in interest in point of fact, and nothing more is necessary to be shown in order to make them parties in interest under the statute, so as to be entitled to the protection which it is designed to afford.

Petitioners are shippers who are as directly and immediately affected by the wasteful duplication of terminal facilities at Kansas City as any shippers could be in any transportation situation subject to change by the construction of competing facilities. The Interstate Commerce Act "was passed for the protection of those who pay or bear the rates." *Texas & Pacific Ry. Co.* v. *United States*, 289 U. S. 627, 638. The purpose of Section 1 (18-22) is "not primarily to protect the railroad but to protect interstate commerce from undue burdens or discrimination." *Colorado* v. *United States*, 271 U. S. 153, 162. And this is but another way of saying that the

primary purpose of these provisions was to protect the shippers who carry on the interstate commerce. There is not the slightest indication of a legislative intention to exclude shippers from the exercise of the remedy created by Section 1 (20). The term "any party in interest" is clearly on its face broad enough to include an interested shipper as well as an interested carrier. The shipper cannot be excluded without interpreting the broad and general language contrary to the known intention of Congress, not only in passing the Interstate Commerce Act as a whole but in enacting the particular paragraph with which we are here concerned.

Conclusion.

Petitioners respectfully submit that they are parties in interest who are authorized under the provisions of Section 1 (20) of the Interstate Commerce Act to institute and maintain this action.

Respectfully submitted,

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